No. 76-1670

In the Supreme Court of the United States

OCTOBER TERM, 1977

LUTTETUS PERRY, AKA TED PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 550 F. 2d 524.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. A petition for rehearing was denied on April 7, 1977. On April 28, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including June 3, 1977, and the petition was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court conducted constitutionally adequate jury selection procedures in this case.

2. Whether it was error to permit a prosecution witness to testify on rebuttal in order to explain seeming discrepancies between her direct testimony and that of several defense witnesses.

3. Whether the government relied upon false testimony.

4. Whether the trial court erred by refusing to give petitioner's requested jury instruction on multiple conspiracies.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to possess heroin and cocaine with intent to distribute it, in violation of 21 U.S.C. 846.[1] He was sentenced to a term of four years' imprisonment with a special parole term of ten years. The court of appeals affirmed (Pet. App. A).[2]

The evidence showed that petitioner and others were involved in a complex and sophisticated scheme involving the smuggling and distribution of heroin and cocaine. The narcotics originated in Mexico under the control of one Juan Leon-Aispuro, whose couriers smuggled the narcotics into the United States, usually into Southern California. The narcotics were then delivered to a number of people, including one Edward Perry (petitioner's cousin), who acted as warehouseman, wholesaler and distributor. Petitioner and his co-defendants

[1]At the close of the government's case, the district court granted a motion for acquittal on a second count, which charged petitioner and others with conspiracy to import heroin and cocaine illegally (R.T. 1078). "R.T." refers to the reporter's transcript of proceedings.

[2]This Court recently denied a petition for certiorari filed by co-defendant Theodore Ware, which raised different issues from those presented here. *Ware* v. *United States*, No. 76-1461, certiorari denied, May 16, 1977.

acted as satellite retailers in different parts of the country (Pet. App. 29). Petitioner, who resided in Detroit, obtained his narcotics either from Edward Perry himself or from couriers (Pet. App. 34).

In late October 1973, June Delores Wright (who testified for the government at trial) flew to Detroit on Edward Perry's request and delivered eight ounces of heroin to petitioner at his home (R.T. 196-198). In February 1974, Edward Perry and Wright took eight pounds of heroin and cocaine to Detroit, including two pounds that they delivered to petitioner (R.T. 202-207). In December 1974, Wright contacted Edward Perry on behalf of a buyer in Detroit, and he told her to call petitioner. She called petitioner, who told her he would sell her six ounces of heroin for $11,000 (R.T. 267-268). Earlier, in November 1974, petitioner had flown into San Diego and delivered $12,000 to Edward Perry. Perry and another co-conspirator thereafter went to Mexico and brought narcotics (R.T. 669-670). Other evidence established that petitioner had been seen with a number of the co-conspirators at an apartment maintained by Edward Perry as a hiding place for his narcotics (R.T. 682-683), and Perry had told Wright after petitioner had left a meeting at Perry's hotel room that petitioner was a very big man in Detroit who could "work from a couple of ounces to two or three pounds a week" and that he, Perry, could not keep petitioner sufficiently supplied (R.T. 255-256).

ARGUMENT

1. Petitioner contends (Pet. 7-12) that he was denied an unbiased and impartial jury because of inadequate *voir dire* questioning of the jurors, especially juror

Van Dorn, and because of the court's refusal to give the defense an additional peremptory challenge.

During the jury selection process the trial court inquired of the jurors whether they would be able to follow his instructions as to the law that was to govern (R.T. 45). Juror Johnston advised the court that he would not be able to fairly try the case because he had already "formed an opinion" after reading the morning paper and overhearing a conversation between "two young ladies," one of whom he later saw talking to "one of the gentlemen." The court dismissed Johnston (*ibid.*). Out of the presence of the jury, defense counsel requested that the court ask the other jurors whether they had also heard comments about the case. The judge refused on the ground that he had already asked the jurors whether they would be willing to have their own case tried by jurors in the same frame of mind as they were then in, and whether they could be fair and impartial, and further inquiry "would be making a mountain out of a molehill" (R.T. 49). He also observed that further questions would emphasize the situation and be detrimental to the defendants (*ibid.*).

After the jury and alternates were selected and sworn, alternate juror Zubricky mentioned to the court that he had overheard a man talking in the hall. In chambers, out of the presence of the jury, Zubricky was asked specifically whether he had talked to the previously excused juror. He had not, he answered, but he had talked to juror Van Dorn; he said he had "whispered" to Van Dorn that he had a daughter "hooked on marijuana," and that he hoped he would not be picked for the jury because he was "not in favor of it at all" (R.T. 51-52). Zubricky also stated that Van Dorn had not responded and was only listening. The court then released Zubricky for cause, but

it refused the defense request for further *voir dire* of the other jury members or Van Dorn in particular as to what Zubricky had told her or whether they had discussed the case or heard others do so (R.T. 53). The court also refused to give the defense an additional peremptory with which to challenge Van Dorn (*ibid.*).

As the court of appeals correctly concluded, the trial court properly exercised its discretion in questioning the jury, and petitioner was not deprived of a fair trial by an impartial jury (Pet. App. 29-32). The Constitution "does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him." *Ristaino* v. *Ross*, 424 U.S. 589, 594. Much of *voir dire* must be left to the trial court's sound discretion, particularly the determination of impartiality, in which demeanor plays such an important part (*id.* at 594-595). Particularly in a non-racial context, there is no *per se* requirement that the court make inquiry into every kind of specific prejudice feared by the defendant in order to satisy the obligation to provide an impartial jury. Indeed, as the district court pointed out, the specific inquiry requested by petitioner here might have served no purpose other than to suggest to the panel the presence of highly prejudicial information. See *Beck* v. *Washington*, 369 U.S. 541, 548.

Under the facts of this case, the district court clearly acted within its discretion during the jury selection process. As a result of the court's questioning, one juror was excused after she voluntarily revealed her acquaintance with one of the attorneys (R.T. 17), and another was excused when he admitted having had "some past experience with narcotics" that would hamper his ability to serve fairly and impartially (R.T. 28-29). Additionally, although juror Johnston's remarks regarding his inability

to be impartial were made in open court before the rest of the prospective jurors, they failed to evoke any similar response from any other jurors, even after they heard the court instruct a prospective replacement juror that he should be willing to be tried by jurors in the same frame of mind as his (R.T. 47). Given the examples of other jurors who, in response to the court's questioning, had volunteered information that might indicate their lack of impartiality, and the court's instructions regarding the jurors' duty to follow the law as given to them, the failure of other jurors to indicate that they had seen or heard the conversation referred to by juror Johnston was adequate reason for the trial court not to risk possible prejudice by further pursuing the matter. Likewise, there was no reason to suggest to juror Van Dorn, by questioning, that she had reason to be prejudiced as a result of Zubricky's whispered reference to his daughter's use of marijuana, which, as the court of appeals correctly observed, did not relate to an opinion of petitioner's guilt or innocence, but rather concerned only a personal problem shared by many parents (Pet. App. 32).[3]

2. Petitioner next contends (Pet. 12-20) that it was error to allow prosecution witness June Delores Wright to testify on rebuttal for the purpose of explaining seeming discrepancies that had arisen between her direct testimony on several collateral matters and the subsequent testimony of certain defense witnesses. Wright initially took the stand and testified about her own and petitioner's involvement in the conspiracy. She also testified as to several tangential matters such as her occupation, her residence, and the identity of certain of

[3]Disapproval of the use of illicit drugs—a societal attitude underlying the laws prohibiting the possession and distribution of such drugs—hardly can be said in and of itself to constitute disqualifying prejudice.

her relatives. The defense presented several witnesses whose testimony was inconsistent with Wright's testimony on these subjects. The trial court allowed the prosecution to put Wright back on the stand for rebuttal, and she clarified these inconsistencies.

In these circumstances, the court of appeals correctly held (Pet. App. 37) that the extent to which rehabilitative evidence may be received after the credibility of the witness has been attacked is a matter in which the trial judge necessarily has broad discretion. See *Beck* v. *United States*, 317 F. 2d 865, 870 (C.A. 5), certiorari denied, 375 U.S. 972; *United States* v. *Panebianco*, 543 F. 2d 447, 455 (C.A. 2); Fed. R. Evid. 104(e) and 611(a)(1).

3. Petitioner also contends (Pet. 17-20) that the government relied upon perjured testimony by Wright. Petitioner cites various inconsistencies between facts as stated in Wright's testimony during the government's case-in-chief and facts brought out by the defense (Pet. 12-13), which Wright reconciled on rebuttal, over defense objections. Petitioner urges that since Wright gave two versions of the facts, the prosecution necessarily knew she was lying in either one case or the other.

As the court of appeals concluded, the record does not support the contention that the government participated in fabricating Wright's testimony or knowingly failed to disclose false testimony (Pet. App. 38). The apparent inconsistencies petitioner lists are largely immaterial, wholly collateral to the issues in the case, and do not demonstrate perjury. For example, although Wright testified that she stayed at the home of her father, David Allen (R.T. 316), petitioner urges that the defense proved that David Allen was not her father (Pet. 13). In fact, the testimony of David Allen, upon which petitioner relies, was that witness Wright was his informally "adopted

daughter," whom he had taken in at age 15 or 16 (R.T. 1089-1090). Petitioner also notes that although Wright testified that she owned a home at 15715 Coyle in 1974, the defense proved that H.U.D. had owned the house at that address since 1972 and had not sold it to June Delores Wright, although a June Jackson was evicted in 1975 (Pet. 13). On rebuttal, Wright testified that she had attempted to purchase the house on Coyle, using the name June Jackson because at the time she was living with a man named Gregg Jackson, and that her attempt to complete the purchase failed because of a real estate swindle (R.T. 1310, 1327-1328).

Although the defense could and did argue to the jury that inconsistencies of this nature in Wright's testimony undermined her credibility, these trivial inconsistencies do not demonstrate that the government knowingly relied upon perjury. Moreover, even if the government's case includes false testimony, so long as the facts are fully exposed and explored before the jury at trial, and (as here) the jury's verdict is supported by substantial evidence, the defendant has not been prejudiced and is not entitled to a new trial. *United States* v. *Acosta*, 526 F. 2d 670 (C.A. 5), certiorari denied, 426 U.S. 920. Since the defense explored the alleged inconsistencies in Wright's testimony at length, even a showing that her testimony was false would not justify reversal of petitioner's conviction.

4. Petitioner contends that the district court erred in not instructing the jury on multiple conspiracies (the indictment charged only a single conspiracy) since multiple conspiracies were in fact proved (Pet. 20-27). This claim was properly rejected by the court of appeals (Pet. App. 39-40):

> The crucial point that defendants miss in this case is the fact that the jury could find that there were several different agreements involving the defendants, all of which would then connect the defendants to the general overall conspiracy as charged

> in the indictment. The government does not have to prove that all of the defendants met together at the same time and ratified the illegal scheme. This just is not the nature of a conspiracy; especially a large narcotics smuggling and distribution organization as we have here. * * * By these separate agreements the defendants became parties to the larger common plan, joined together by their knowledge of its essential features and scope, though not of the exact limits, and by their single goal. These agreements were merely steps in the formation of the larger and more general conspiracy. See *Blumenthal* v. *United States*, 332 U.S. 539.

While an instruction on multiple conspiracies should be given when the possibility of a variance between the indictment and the proof at trial appears, *United States* v. *Varelli*, 407 F. 2d 735, 746 (C.A. 7), the court of appeals correctly concluded that there was no such variance here, and the failure of the district court to instruct the jury as requested caused no prejudice to petitioner (Pet. App. 40). See *United States* v. *King*, 472 F. 2d 1, 12 (C.A. 9), certiorari denied *sub nom. Butler* v. *United States*, 414 U.S. 864; *United States* v. *Calabro*, 449 F.2d 885, 894 (C.A. 2), certiorari denied, 404 U.S. 1047.[4]

Moreover, in order to find petitioner guilty in accordance with the trial court's instructions, the jury had to find that petitioner joined the overall conspiracy

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[4]Petitioner's guilt does not depend upon his knowing all the members of the conspiracy; it sufficed that the government showed that he had to know from the scope of the operation that others were involved. See *United States* v. *Papa*, 533 F. 2d 815, 820 (C.A. 2); *United States* v. *Sisca*, 503 F. 2d 1337, 1345 (C.A. 2); *United States* v. *Hester*, 465 F. 2d 1125, 1127 (C.A. 8).

charged, rather than one of a number of smaller conspiracies: the court instructed the jury that to establish the offense charged there must be proof that "the *conspiracy described in the indictment* was willfully formed" and that "the accused willfully became a member"; they must find "beyond a reasonable doubt that the existence *of the conspiracy charged* has been proved" (R.T. 1628-1629; emphasis added).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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